IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TROY CORPORATION, a Delaware corporation, Plaintiff, v. RICHARD W. SCHOON, WILLIAM J. BOHNEN, STEEL INVESTMENT COMPANY, a Delaware corporation, PETER J. SOLOMON COMPANY LIMITED, a Delaware corporation, PETER J. SOLOMON COMPANY, L.P., a Delaware limited partnership, and PETER J. SOLOMON SECURITIES COMPANY LIMITED, a Delaware corporation, and INTERNATIONAL SPECIALITY PRODUCTS, INC., a Delaware corporation, Defendants.	)	C.A. No. 1959-VCL

MEMORANDUM OPINION AND ORDER

Submitted: February 12, 2007
Decided: March 26, 2007

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LAMB, Vice Chancellor.

A Delaware corporation sues several Delaware entities for breach of contract and related fiduciary duty claims, the substance of which involve the allegedly wrongful dissemination and use of the corporation's sensitive financial information. Certain defendants move to dismiss, arguing, *inter alia*, that a forum selection clause contained in the agreement governing the parties' relationship requires any suit arising under the contract be brought in a New York court. Since the forum selection clause, by its own terms, is inapplicable to the particular factual situation at issue, the plaintiff's suit is properly maintainable in this court. Therefore, the motion to dismiss will be denied.

I.

A. The Parties

The plaintiff is Troy Corporation, a privately held Delaware company. Troy is an industrial manufacturer of microbial degradation, mold control, and wood preservation products. The moving defendants are Peter J. Solomon Company Limited, a Delaware corporation, Peter J. Solomon Company, L.P., a Delaware limited partnership, and Peter J. Solomon Securities Company Limited, a Delaware corporation (collectively, "Solomon").[1] Solomon provides investment banking services and advice in the areas of mergers and acquisitions.

[1] Richard W. Schoon, William J. Bohnen, Steel Investment Company, and International Specialty Products, Inc. are the other named defendants in this action. The court has been informed that those parties are engaged in ongoing settlement negotiations with Troy, and they do not join Solomon in the present motion.

B. The Facts

In 2003, Troy retained Solomon with an eye toward helping Troy secure capital, identify potential acquisition targets, and pursue an acquisition strategy. To memorialize this arrangement, Troy and Solomon executed two separate letter agreements, one dated January 22, 2003 and one dated August 1, 2003. Both agreements required Solomon to maintain the confidentiality of Troy's non-public information.[2]

In its amended complaint, Troy advances several different theories of liability against Solomon. The first centers on Solomon's purported breach of the confidentiality provisions contained in the letter agreements. The second theory posits that, in making the unauthorized disclosures, Solomon breached a fiduciary obligation owed to Troy. Finally, Troy alleges that Solomon aided and abetted breaches of fiduciary duty by certain Troy directors when those individuals misused sensitive corporate information.

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[2] The January 2003 agreement provides:

> The Information will be kept confidential by [Solomon], and will not be used in any way detrimental to [Troy], will not be used other than in connection with the Evaluation, and will be safeguarded from unauthorized disclosure.

The August 2003 agreement provides:

> Except as contemplated by the terms hereof or as required by applicable law, [Solomon] shall keep confidential all information provided [to Solomon] by [Troy], unless publicly available or otherwise available to [Solomon] without restriction or breach of any confidentiality agreement, and shall not disclose such information to any third party, other than in confidence to its employees, agents, representatives and advisors, without [Troy's] prior approval. Notwithstanding anything herein to the contrary, the terms of this agreement and any and all discussions related hereto shall remain subject to any Confidentiality Agreement currently existing between [Troy] and [Solomon].

The basis for Solomon's present motion is the presence of both a forum selection clause and a choice of law clause in the August 2003 agreement. Those provisions, which Solomon drafted, state:

> 7(e). [T]his agreement, including all controversies arising from or relating to performance under this agreement, shall be governed by and construed in accordance with the laws of the State of New York, without giving effect [to] such state's rules concerning conflicts of law.
>
> 7(g). Any lawsuits with respect to, in connection with or arising out of this agreement shall be brought in a court for the Southern District of New York and the parties hereto consent to the jurisdiction and venue of such court for the Southern District as the sole and exclusive forum, unless such court is unavailable, for the resolution of claims by the parties arising under or relating to this agreement.

The January 2003 agreement does not contain a forum selection clause, but does include a Delaware choice of law provision.

Troy filed the original complaint in this action on February 24, 2006 and amended its pleading on August 15, 2006. Solomon moved to dismiss the amended complaint pursuant to Court of Chancery Rule 12(b)(3) on September 25, 2006.

II.

In favor of its motion, Solomon first argues that the August 2003 agreement, not the January 2003 agreement, defined and controlled the relationship between the parties. Solomon maintains that the relative specificity, subject matter, and

timing of the letters all show that the second agreement–the parties' engagement letter–effectively incorporated, expanded upon, and superceded the first agreement –a brief confidentiality agreement executed prior to the establishment of a formal investment banking relationship.

Next, Solomon claims that, under New York law, the forum selection clause contained in the August 2003 agreement is fully enforceable as drafted. Arguing that the clause is by no means "a model of drafting clarity," Solomon says the provision at issue nonetheless embraces the parties' then-existing intention that all suits concerning their contractual relationship be adjudicated in a New York court.

Finally, Solomon takes issue with what it deems an "apparent effort to evade the forum selection clause in the [August 2003] agreement" on Troy's part. Solomon argues that the claims for aiding and abetting the directors' breach of fiduciary duty and for Solomon's purported breach of fiduciary duty in its own right are inherently intertwined with Troy's primary breach of contract claims. Since these subsidiary causes of action essentially arise from the asserted breach of contract, Solomon says the forum selection clause should apply to them as well.

Troy claims this court may properly adjudicate the parties' dispute, primarily because the forum selection clause of the August 2003 agreement is inoperative and unenforceable. That provision, Troy argues, unambiguously selects the United States District Court for the Southern District of New York as the agreed upon

venue. Since both Troy and Solomon are Delaware entities and no federal question is involved, the United States District Court for the Southern District of New York lacks subject matter jurisdiction. Troy argues the contract's silence as to a specific alternative venue when the Southern District is "unavailable" effectively means Troy enjoyed the freedom to bring suit in a Delaware state court. Alternatively, Troy argues that, even assuming the forum selection clause precludes this court from hearing its breach of contract claims, the aiding and abetting and breach of fiduciary duty causes of action are outside the operation of the clause. Thus, at the very least, those particular claims are properly before this court.

III.

The court will consider a motion to dismiss based upon a forum selection clause under Rule 12(b)(3) (improper venue), rather than Rule 12(b)(6) (failure to state a claim).[3] Under this standard, the court "is not shackled to the plaintiff's complaint" and "is permitted to consider extrinsic evidence from the outset."[4] Moreover, the well-settled rule is that the court should "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect

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[3] *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000) (following the majority approach of the federal courts in construing the identical federal counterpart to Court of Chancery Rule 12(b)(3)).

[4] *Id.* at *4-5 (noting the practical advantages of the Rule 12(b)(3) standard because it dispenses with the need for the court to arduously examine whether the forum selection clause is incorporated into and integral to the complaint).

for the parties' contractual designation."[5] For a forum selection clause to be strictly binding, the parties must use "express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action."[6] If the contractual language is not crystalline, "a court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive."[7]

IV.

Assuming, without deciding, that Solomon correctly asserts the August 2003 agreement is controlling as to all of Troy's claims, Solomon's reliance on that agreement's forum selection clause is misplaced.[8] The provision at issue unambiguously expresses the parties' then-existing intention to litigate any future disputes between them in a New York federal court. Without question, however, the federal court is unavailable here because it lacks subject matter jurisdiction

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[5] *Prestancia Mgmt. Group, Inc. v. Virginia Heritage Found. II, LLC*, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005) (quoting DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 5-4[a], at 5-53 to 5-54 (2005)).

[6] *Id.* (quoting *Eisenbud v. Omnitech*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996)).

[7] *Id.*

[8] Because the court finds that the forum selection clause represents the unambiguous agreement of the parties to litigate any dispute arising under or relating to their contractual relationship in the United States District Court for the Southern District of New York, it does not reach Troy's argument that its claims arise under the January 2003 agreement–a document which lacks a forum selection provision–and is therefore not contractually confined to bring suit in a specific forum. Along the same lines, because the court holds that the forum selection clause does not bar Troy's breach of contract action, there is no need to address Troy's position that its claims for aiding and abetting and breach of fiduciary duty arise independently of the underlying breach of contract claims.

over Troy's claims. And since the clause at issue does not speak to an alternative forum, Troy, exercising the substantial discretion that a plaintiff naturally enjoys over its choice of venue, appropriately brought suit against Solomon in the Delaware Court of Chancery.[9]

Both New York and Delaware[10] adhere to the basic hornbook principles of contract interpretation which "emphasize[] the interpretive primacy of giving effect to the parties' intention as expressed by the written words of their agreements."[11] Likewise, both jurisdictions recognize and follow the fundamental tenet of contract construction that ambiguity only occurs when the disputed provision is capable of being read in two different, albeit reasonable, ways.[12]

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[9] In this regard, the court notes that Solomon has not contested personal jurisdiction in this court and has not moved for dismissal under a forum non conveniens theory.

[10] Because New York and Delaware law both apply virtually identical contract principles to the interpretive issues presented in this case, the court finds it unnecessary, at least at this point in the litigation, to determine what state's law applies to the underlying substantive dispute. The court does take note, however, of the general rule that when two separate contracts address the same subject matter they must be interpreted together to the extent possible; but, in the face of inconsistent terms, the latter in time should control. *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007); *Philipp Bros. Inter-Continent Corp. v. U.S.*, 1966 U.S. Dist. LEXIS 8154, at *57-58 (S.D.N.Y. May 18, 1966); 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1293, 1296 (1962). Since the August 2003 agreement specifies New York law and the January 2003 contract requires Delaware law, it would seem proper to apply New York law to the parties' contractual dispute.

[11] *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *8 (Del. Ch. July 21, 2000) (citing *USA Cable v. World Wide Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *8 (Del. Ch. June 27, 2000), *aff'd*, 766 A.2d 462 (Del. 2000)). *See, e.g.*, *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992); *Kass v. Kass*, 91 N.Y.2d 554, 566-67 (N.Y. 1998); *Laba v. Carey*, 29 N.Y.2d 302, 308 (N.Y. 1971).

[12] *See, e.g.*, *Multi-Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *6 (Del. Ch. Feb. 2, 2007) (citing *Simon*, 2000 WL 1597850, at *7); *McCabe v. Witteveen*, 825 N.Y.S.2d 499, 501 (N.Y. App. Div. 2006) ("Contract language which is clear and unambiguous must be enforced according to its terms. The test for determining whether contract language is

According to its plain terms, the forum selection clause provides for exclusive jurisdiction over any dispute "with respect to, in connection with or arising out of" the August 2003 agreement "in a court for the Southern District of New York . . . unless such court is unavailable . . . ." On its face, then, the forum selection clause represents the parties' voluntary decision to litigate in a specific federal court–the United States District Court for the Southern District of New York–*unless* that court is, for one reason or another, unavailable to hear the dispute.

Questions of federal subject matter jurisdiction are, in most circumstances, the specific and sole province of the federal court charged with entertaining a given claim.[13] However, the parties in this case cannot argue, at least with any modicum of seriousness, that federal subject matter jurisdiction exists over any aspect of the present dispute. Troy's suit does not involve a federal question; jurisdiction, then,

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ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation.") (citations omitted).

[13] The court notes that its finding as to lack of diversity in the present case would not, of course, be at all binding on a federal court. However, Delaware courts in the past have engaged in a similar academic exercise to determine whether or not federal jurisdiction could exist over a particular claim. *See Zeneca, Inc. v. Monsanto Co.*, 1996 WL 104254 (Del. Ch. Mar. 15, 1996) (noting that the "awkwardness" of opining on federal subject matter jurisdiction is "significantly reduced" when the undisputed facts clearly show that such jurisdiction either exists or is lacking). Indeed, the court would be extremely hesitant to register any thoughts on subject matter jurisdiction if the issue was any less clear cut than it is here (e.g., a dispute regarding an individual's subjective intent to maintain residence in a given state or concerning a determination of a corporation's principal place of business).

would not exist in the Southern District of New York under 28 U.S.C. § 1331.[14] Likewise, diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a)(1) is lacking: Troy is organized in Delaware, and two of the Solomon defendants are Delaware corporations.[15] While the court does not lightly consider the issue of federal subject matter jurisdiction, it is indisputably clear that a federal tribunal could not adjudicate this action. Therefore, the federal court referenced in the forum selection clause of the August 2003 agreement is most assuredly "unavailable" for purposes of Solomon's motion.

The fact that the forum selection clause specifically contemplates suit only in the United States District Court for the Southern District of New York is perhaps best shown by deconstructing Solomon's arguments to the contrary. Solomon claims that the clause envisions suit anywhere in the geographical region of southern New York. This contention is patently unreasonable and represents a

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[14] 28 U.S.C. § 1331 (1980) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[15] 28 U.S.C. § 1332(a)(1) (2005) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states."). *See also Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 829 (1989) (discussing the complete diversity requirement and noting "[w]hen a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal") (emphasis in original); *Moor v. Alameda County*, 411 U.S. 693, 718 (1973) (reciting the well known rule that for purposes of diversity jurisdiction "corporations are citizens of the State in which they are formed"). The court is free to take judicial notice of the fact that a corporation appearing as a party before it has filed its organizational documents in a particular state, especially in the context of a Rule 12(b)(3) motion. *Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999) (noting the propriety in the Rule 12(b)(6) setting of taking judicial notice of facts available in the public record, such as SEC filings).

last gasp attempt to create ambiguity in the challenged provision where none objectively exists.[16]

First, as matter of basic grammar, the mere fact that "Southern District" is capitalized would suggest to any reasonable third party that Troy and Solomon were referring to a specific tribunal, not a geographic locale.[17] Solomon's post hoc interpretation is weakened further by the question such an interpretation inherently begs: What boundaries define this ephemeral "Southern District" of New York? Must Troy draw an imaginary line bisecting the state east to west and then content itself to bring suit anywhere south of the Maginot, uncertain as to whether or not it has hit the mark? Does this purported "Southern District" encompass some arbitrary radius emanating from the middle of Central Park? Such practical difficulties illustrate the illogical nature of this argument.

Most importantly, however, Solomon's contention that the parties intended to include New York state courts within the ambit of the forum selection clause

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[16] It bears mentioning that even if the forum selection clause here was ambiguous (which it is not), Solomon's motion would still fail because the court, pursuant to the doctrine of *contra preferentem*, would resolve ambiguity against Solomon as the drafter of the contract. *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003); *Matter of Riconda*, 90 N.Y.2d 733, 740-41 (N.Y. 1997). *See also* 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2006) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

[17] MARGARET SHERTZER, THE ELEMENTS OF GRAMMAR 55, 62-63 (1986) ("Capitalize *Federal* and *State Courts* when used with a definite name." "Do not capitalize adjectives derived from regional names when they are merely descriptive in character." "Capitalize *northern*, *southern*, *western*, *eastern*, etc. when used as part of proper names to designate a world division; do not capitalize such words when used to indicate parts of states.") (emphasis in original).

suffers from an irreconcilable deficiency as a matter of positive law. State courts, unlike federal courts, enjoy general jurisdiction and always stand "available" to adjudicate a dispute involving contract-related claims. Hence, the inclusion of the clause "unless such court is unavailable" shows that the parties must have envisioned a forum that could actually suffer such jurisdictional incapacity–the United States Court for the Southern District of New York. Given the contract at issue, a state court could not be subject to such a proviso.[18]

The simple fact that the forum selection clause includes unavailability language suggests that the parties contemplated, but chose not to specifically address, the exact contingency this case presents. In the face of such silence, then, it is clear to the court that if and when the United States District Court for the Southern District of New York stood incapable (as it obviously does now) of adjudicating a suit between them, the parties intended to return themselves to the default position of being able to sue in a procedurally appropriate venue of their own choosing. As such, the provisions of the August 2003 agreement do not preclude Troy from maintaining its suit in Delaware.

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[18] Solomon's fruitless argument that state courts can be unavailable in certain circumstances merits little attention. By listing a sprinkling of disputes over which state courts do not have jurisdiction, such as copyright cases and admiralty claims, Solomon vainly seeks to give the unavailability language a meaning that would be unreasonable to any objective reader *of this contract*. Solomon fails to point out how a such disputes could ever arise between Troy and itself in the context of this particular agreement.

The court does recognize that under New York law, a forum selection clause should be deemed exclusive if it contains "[a]ny language that *reasonably* conveys the parties' intention to select an exclusive forum."[19] To set aside such a clause, a party must show that "enforcement would be unreasonable or unjust or that the clause is invalid . . . ."[20] However, the law Solomon cites does not aid its arguments. First, the court in this case is not setting aside or refusing to enforce the forum selection clause. It is simply recognizing that the contractual language used chose the United States District Court for the Southern District of New York and that court is unavailable. A ruling that the necessary factual requisites are lacking for a dispute to fall within the confines of a contractual provision is not at all akin to refusing to enforce such a provision entirely. Second, the clauses at issue in the cases relied upon by Solomon were simply broader than the one the court now encounters.[21] In sum, this court refuses Solomon's implicit invitation to bail it out of the situation it finds itself in by adopting an unreasonable reading of

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[19] *Fitzgerald v. Cantor*, 1998 WL 842304, at *2 (Del. Ch. Nov. 5, 1998) (citing *Water Energizers, Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 212 (S.D.N.Y. 1992)) (emphasis added).

[20] *Id.* (citing *Bell Constructors, Inc. v. Evergreen Caissons, Inc.*, 654 N.Y.S.2d 80, 81 (N.Y. Sup. Ct. 1997)).

[21] *Del Pharmaceuticals, Inc. v. Access Pharmaceuticals, Inc.*, 2004 WL 1631355, at *2, *3 (Del. Ch. July 16, 2004) (discussing an agreement to submit to "the jurisdiction of the federal and/or state courts in the State of New York in the United States of America"); *Fitzgerald*, 1998 WL 842304, at *2 (discussing an agreement to submit to "the jurisdiction of either the United States District Court for the Southern District of New York or any New York State Court of competent jurisdiction located in New York County"). As is painfully obvious, these cases amply illustrate that which was plainly missing from the agreement in this case: a state court alternative in the event a federal court could not hear the dispute.

the contract language which could have easily been rectified by the inclusion of a few more thoughtful words in the parties' agreement.

V.

For the foregoing reasons, the Solomon defendants' motion to dismiss pursuant to Court of Chancery Rule 12(b)(3) is DENIED. IT IS SO ORDERED.